



Signed and Filed: September 8, 2021

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy Case
) No. 19-30088-DM
PG&E CORPORATION,)
) Chapter 11
 - and -)
) Jointly Administered
PACIFIC GAS AND ELECTRIC COMPANY,)
)
 Reorganized Debtors.)
)
 ☐ Affects PG&E Corporation)
 ☐ Affects Pacific Gas and)
 Electric Company)
 ☒ Affects both Debtors)
)
 * All papers shall be filed in)
 the Lead Case, No. 19-30088 (DM).)
)
)

MEMORANDUM DECISION REGARDING DEBTORS' OBJECTION TO CONSOLIDATED
EDISON DEVELOPMENT, INC.'S AMENDED CURE PAYMENT DEMAND

On August 10, 2021, this court held a hearing on the objection by PG&E Corporation and Pacific Gas and Electric Company (the "Utility" and collectively, "Debtors") to the amended cure claim demand of Consolidated Edison Development, Inc. ("ConEd" or "CED") in the amount of \$11,844,598.00 (the

1 "Amended Cure Demand").¹ The Amended Cure Demand arose out of
2 Debtors' assumption of certain power purchase agreements
3 ("PPAs") and interconnection agreements ("IAs") (collectively,
4 the "CED Agreements") that Utility entered with ConEd or its
5 affiliates. For the reasons set forth below, the court is
6 sustaining Debtors' claim objection (the "Objection").

7 I. THE UNDERLYING TRANSACTIONS AND THE AMENDED CURE DEMAND

8 ConEd's subsidiaries or predecessors built, own and operate
9 energy generating facilities and sell the energy and certain
10 attributes generated (including "green attributes" such as
11 Renewable Energy Certificates) to the Utility. This enables the
12 Utility to, among other things, meet its resource adequacy and
13 renewable energy requirements prescribed by the California
14 Public Utilities Commission ("CPUC"). See Amended Cure Demand,
15 ECF pgs. 3-4. There is no doubt that the PPAs, the relationship
16 between the Utilities and ConEd, and the related financing
17 obligations undertaken by ConEd in connection with those
18 activities were and are an integral part of the PPAs and the
19 California renewable energy presence as regulated by the CPUC.

20 There is also no doubt that ConEd made no attempt to
21 terminate or accelerate its rights under the CED agreements at
22 any time before or after confirmation of Debtors' Chapter 11
23 Plan of Reorganization dated June 19, 2020 (dkt. 8048),
24 confirmed on June 20, 2020 (dkt. 8053) (the "Plan").
25

26
27 ¹ The Amended Cure Demand is attached as Exhibit A to the
28 Objection at dkt. 10613-1.

1 Finally, there is no doubt that ConEd is limited to
2 recovery of "direct" damages under those agreements and that the
3 sole stated rationale for its assertion of the Amended Cure
4 Amount is the assertion of damages by its financiers specifically
5 caused by Debtors' bankruptcy. No other "trigger" is
6 identified.

7 ConEd has received payment of approximately \$9.1 million
8 curing all monetary defaults under the CED Agreements in full
9 (including post-petition default interest as required for
10 assumption). The other monetary defaults that were cured when
11 the Plan became effective were for pre-petition deliveries that
12 became due in the first month after the bankruptcy cases were
13 filed; settlement obligations arising in July, 2018, that were
14 only approved by the CPUC in April, 2019; and payment of Network
15 Upgrade Reimbursements due under IAs with two of ConEd's
16 affiliates.

17 ConEd nonetheless contends that it is entitled to
18 additional cure damages in the amount of \$11,844,598.00 because
19 the commencement of the underlying cases triggered other events
20 of default under Article 5.1 of the PPAs:

21 Events of Default. An "Event of Default" shall mean,
22 (a) with respect to a Party that is subject to the
23 Event of Default, the occurrence of any of the
24 following: (i) the failure to make, when due, any
25 payment required pursuant to this Agreement if such
26 failure is not remedied within five (5) Business
Days after Written Notice is received by the Party
failing to make such payment [and] (v) such
Party becomes Bankrupt

1 PPA Art. 5.1(a)(i) and (v) (emphasis added). ConEd asserts that
2 Debtors' commencement of these bankruptcy cases caused it to
3 default on its agreements with its own lenders (the "Third Party
4 Lenders") and thus incur additional liability to them. See
5 Notices of Defaults and related correspondence filed under seal
6 as Exhibit E to the Objection. Notably, Debtors were not
7 parties to the loan agreements between ConEd and its Third Party
8 Lenders. ConEd refers generally to "cross-default" provisions
9 in those agreements with the Third Party Lenders, but contends
10 specifically only that Debtors' bankruptcy caused defaults under
11 them.

12 ConEd's Amended Cure Demand is comprised of default
13 interest (\$4,805,060.00), consent fees (\$6,000,000.00) and
14 attorneys' fees (\$1,039,538.00) that it purportedly had to pay
15 its Third Party Lenders as a consequence of the underlying
16 bankruptcy cases. As stated in its Amended Cure Demand:

17 The Debtors' bankruptcy filing constituted a default
18 by the Utility under the PPAs and the Utility's
19 failure to perform under the IAs post-petition
20 constituted further defaults and breaches of the
agreements.

21 See Part V of the Amended Cure Demand, ECF pg. 7. ConEd also
22 asserts that Debtors defaulted in payments that became due under
23 the PPAs in January 2019. These are the payments Debtors made
24 as part of their cure when the Plan became effective.

25 In response, Debtors assert that they were not parties to
26 ConEd's agreements with the Third Party Lenders, nor were they
27 aware of the terms and conditions of such third-party financing
28 agreements. They also observe that even if they had been

1 parties to these agreements, the Bankruptcy Code² and other
2 governing law precludes the enforcement of bankruptcy default
3 provisions or *ipso facto* clauses. Debtors also repeat that they
4 cured all monetary defaults under the PPAs through the \$9.1
5 million payment.

6 Debtors also argue that even if ConEd could prevail on the
7 merits of its claims, its damages are consequential in nature
8 and barred by the express terms of the CED Agreements. The
9 court accepts Debtors' principal arguments (discussed below).
10 It declines the temptation to address this alternative argument,
11 except to identify it.

12 II. ISSUES

- 13 1. Is ConEd's Amended Cure Demand, based on the filing of
14 the underlying bankruptcy cases by Debtors, barred by the
15 Bankruptcy Code's prohibition against enforcement of *ipso*
16 *facto* clauses, or bankruptcy default provisions? YES.
- 17 2. Do the safe harbor provisions of section 556 preclude
18 application of the *ipso facto* clauses? NO.
- 19 3. Do any enforceable cross-default provisions of the CED
20 Agreements alter the outcome? NO.
- 21 4. Even if ConEd's claims were not barred by the Bankruptcy
22 Code, are they barred by the terms of the CED Agreements
23 prohibiting the recovery of consequential or similar
24 damages? NOT DECIDED.

27 ² Unless otherwise indicated, all section references are to the
28 Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 III. DISCUSSION

2 A. ConEd may not recover from PG&E because the *ipso*
3 *facto* provisions are unenforceable.

4 While ConEd has set forth interesting and creative theories
5 in support of its Amended Cure Demand, the claim itself is not
6 allowable as a matter of law. Debtors were not parties to
7 ConEd's third-party financing agreements. Whether they were
8 aware of those agreements, which clearly is the case, is
9 irrelevant. ConEd has not produced any financing agreement
10 between it and a Third Party Lender that was executed by or
11 joined by Debtors. Any benefit they would have derived from the
12 Third Party Lender financing is too remote and incidental to
13 justify imposition of liability.³ The agreements with the Third
14 Party Lenders were not a part of, or integrated into, the CED
15 Agreements. But even if the court could somehow determine that
16 Debtors assumed liability under the contracts between ConEd and
17 the Third Party Lenders, governing bankruptcy law precludes
18 enforcement of such agreements.

19 Debtors cured all defaults under the CED Agreements
20 pursuant to and through the Plan. No monetary defaults exist.
21 The event giving rise to ConEd's disputed cure demand is the
22 filing of the underlying bankruptcy cases ("*v*) *such party*
23 *becomes Bankrupt*"). In its Amended Cure Demand and its
24 Response, ConEd contended that but for Debtors' bankruptcy

25 ³ In order to procure the financing, ConEd requested Debtors to
26 execute certain consents and agreements to permit it to pledge
27 the PPAs as collateral on its Third Party Financing Agreements.
28 Debtors agreed, but this does not constitute an amendment of the
 CED Agreements or an assumption of liability of ConEd's
 obligations to its Third Party Lenders.

1 filings, it would not have incurred damages arising from its
2 obligations under contracts to which Debtors were non-parties.⁴
3 Specifically, ConEd stated "[t]he Debtors' bankruptcy filing
4 constituted a default" which "[c]onsequentially" caused it to
5 suffer "direct damages" in the form of default interest, consent
6 fees, and other costs.

7 Section 365(b)(2)(A) expressly excludes defaults that must
8 be cured upon assumption under section 365(b)(1), "a default
9 that is a breach of a provision relating to . . . the insolvency
10 or financial condition of the debtor *at any time before the*
11 *closing of the case.*" 11 U.S.C. § 365(b)(2)(A) (emphasis added).
12 More significantly, section 365(b)(2)(B) excuses debtors from
13 curing a default relating to "the commencement of a [bankruptcy]
14 case. . . ." 11 U.S.C. § 365(b)(2)(B). Thus, the act of filing
15 for bankruptcy cannot be a cognizable ground for default. See
16 also 11 U.S.C. § 1124(2)(A) (a claim is unimpaired even if
17 debtor defaulted on an *ipso facto* clause by filing bankruptcy).
18 To the extent the Bankruptcy Code explicitly excuses Debtors
19 from curing defaults arising from filing their bankruptcy
20 petitions, ConEd's Amended Cure Amount claim based on such
21 filings is not allowable. See 11 U.S.C. § 502(b)(1); see also
22 *Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec.*
23 *Co.*, 549 U.S. 443, 449, 451-52 (2007) (recognizing that a claim

24
25 ⁴ In addition, in its notice of default correspondence to
26 Debtors, Con Ed stated that the event of default under its
27 financing agreements with the Third Party Lenders was "on
28 account of the January 29, 2019 filing by [Debtors] for
bankruptcy protection." See Debtors' MPA in Support of Objection
to ConEd's Claim (sealed) at dkt. 10830 and Exh. E. to the
Objection (also sealed).

1 may be disallowed if unenforceable under "applicable law",
2 including the Bankruptcy Code. To conclude otherwise would
3 eviscerate Section 365(b) (2).⁵

4 ConEd stresses that defaults caused by a bankruptcy trigger
5 are not expressly disallowed. That is true, literally, but
6 overlooks that they are also not expressly allowed, and what
7 must be paid as part of the cure upon assumption are expressly
8 excluded from the cure. It also argues that while curing *ipso*
9 *facto* defaults is not a precondition to assumption, it "does not
10 extinguish the default." That also may literally be a true
11 statement, but as a practical matter, it neutralizes the effect
12 of the default and renders it meaningless, at least between the
13 Utility and its contractual counter-party, ConEd. Whatever the
14 consequence vis-à-vis ConEd and any of the Third Party Lenders
15 is not the point. Any asserted damages by such lenders is not
16 "direct", particularly since the only cited trigger is the very
17 same *ipso facto* one that section 365(b) (2) deals with.

18 Debtors did not seek to assume any Third Party Lenders'
19 obligations, but only the contractual agreements with ConEd, the
20 CED Agreements. Absent evidence of a direct non-incidental
21 benefit to Debtors of ConEd's financing with the Third Party
22

23 ⁵ Numerous courts are in accord. See, *In re Peaches Recs. &*
24 *Tapes, Inc.*, 51 B.R. 583 (B.A.P. 9th Cir. 1985); *In re Charter*
25 *Commc'ns*, 419 B.R. 221 (Bankr. S.D.N.Y. 2009); *In re Chateaugay*
26 *Corp.*, No. 92-cv-7054 (PKL), 1993 WL 159969 (S.D.N.Y. May 10,
27 1993); *In re Claremont Acquisition Corp., Inc.*, 113 F.3d 1029
28 (9th Cir. 1997); *In re Yates Dev., Inc.*, 241 B.R. 247 (Bankr.
M.D. Fla. 1999), *aff'd*, 256 F.3d 1285 (11th Cir. 2001); *In re*
Jennifer Convertibles, Inc., 447 B.R. 713 (Bankr. S.D.N.Y.
2011).

1 Lenders, ConEd's claim cannot survive the Bankruptcy Code's
2 prohibition against the enforcement of *ipso facto* clauses where,
3 like here, it simply asserts that the filing and existence of
4 the bankruptcy case triggered the claims.

5 Finally, ConEd did not seek to terminate or modify any
6 provision of any CED Agreement, so there was nothing to
7 implicate Section 365(e).

8 B. The Safe Harbor Provisions of Section 556 Are
9 Inapplicable.

10 For the first time since the commencement of these cases,
11 and only after confirmation of the Plan and cure of its defaults
12 under section 365, ConEd contends that the PPAs are forward
13 contracts, which the Bankruptcy Code defines as

14 a contract (other than a commodity contract []) for
15 the purchase, sale, or transfer of a commodity . . .
16 which is presently or in the future becomes the
17 subject of dealing in the forward contract
18 trade . . . with a maturity date more than two days
19 after the date the contract is entered into

20 11 U.S.C. § 101(25)(A). ConEd further argues that section 556
21 purportedly exempts it from the application of section 365(e).

22 The contractual right of a . . . forward contract
23 merchant to cause the liquidation, termination, or
24 acceleration of a commodity contract, as defined in
25 section 761 of this title, or forward contract
26 because of a condition of the kind specified in
27 section 365(e)(1) of this title, and the right to a
28 variation or maintenance margin payment received
from a trustee with respect to open commodity
contracts or forward contracts, shall not be stayed,
avoided, or otherwise limited by operation of any
provision of this title or by the order of a court
in any proceeding under this title.

1 11 U.S.C. § 556. These safe harbor provisions protect the
2 counterparty's rights to terminate, liquidate or accelerate
3 forward contracts. As previously noted, ConEd never sought
4 termination, liquidation, or acceleration of the CED Agreements
5 during the course of this case. For that reason, section 556 is
6 irrelevant even if the CED Agreement could be considered a
7 forward contract, an issue the court does not need to resolve.

8 C. The Cross-Default Provisions do not change the
9 result.

10 ConEd further argues that Debtors must cure cross-defaults
11 arising from the agreements with ConEd's Third Party Lenders,
12 citing, *inter alia*, *In re Liljeberg Enters.Inc.*, 304 F.3d 410
13 (5th Cir. 2002) and *In re Kopel*, 232 B.R. 57 (Bankr. E.D.N.Y.
14 1999). In order to assume a particular executory contract or
15 unexpired lease, a trustee or debtor-in-possession is only
16 required to perform under that discrete contract or lease, not
17 under other, substantially unrelated agreements. This principle
18 applies even where distinct agreements are set out in the same
19 document. *Stewart Title Guar. Co. v. Old Republic Nat'l Title*
20 *Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996) ("If a single
21 contract contains separate, severable agreements the debtor may
22 reject one agreement and not another.").

23 Many courts also agree that cross-default provisions do not
24 integrate two or more separate contractual obligations for the
25 purposes of assumption. See, e.g., *In re Plitt Amusement Co. of*
26 *Washington, Inc.*, 233 B.R. 837, 847-48 (Bankr. C.D. Cal. 1999)
27 ("It is well-settled that, in the bankruptcy context, cross-
28 default provisions do not integrate otherwise separate

1 transactions or leases . . . The cross-default provisions must
2 be disregarded in the bankruptcy law analysis, because they are
3 impermissible restrictions on assumption and assignment").

4 Courts enforcing cross-default provisions generally examine
5 whether the failure to enforce the clause would deprive the non-
6 debtor party of an essential part of its bargain.

7 For example, in *Liljeberg*, the debtor was part of a
8 corporate group that constructed and owned a hospital with
9 financing from a corporate lending group that operated
10 hospitals. There were complicated and inter-related agreements,
11 including: a mortgage note and mortgage; a lease and an
12 agreement the debtor sought to assume, allowing the debtor to
13 operate a pharmacy. *Liljeberg*, 304 F.3d at 419. The debtor
14 defaulted under a separate loan agreement, resulting in a
15 judgment causing the hospital to be sold. *Id.* at 420-21. The
16 pharmacy agreement contained a cross-default clause providing
17 that the agreement would terminate if the hospital was sold.
18 *Id.* at 441. In the context of the overall transaction, the
19 court found that the pharmacy agreement "functioned much like an
20 overriding royalty payment," *id.* at 433, providing one element
21 of the consideration for the debtor's leasing its hospital.
22 Thus, to allow the debtor to assume the pharmacy contract after
23 the debtor's default regarding the hospital would "thwart [the
24 lending group's] bargain in agreeing to enter into the pharmacy
25 agreement, all a part of the overall transaction to finance the
26 building of the hospital through a loan secured by a collateral
27 mortgage." *Id.* at 446.

1 Similarly, in *Kopel v. Campanile (In re Kopel)*, 232 B.R. 57
2 (Bankr. E.D.N.Y. 1999), the court enforced a cross-default
3 provision linking agreements executed in conjunction with the
4 sale of a veterinary practice. One agreement was an installment
5 sale of the practice itself; another was a lease of the space in
6 which the practice was conducted. The lease contained a
7 provision requiring its termination if the tenant defaulted
8 under the purchase agreement. The court found that this cross-
9 default provision was inserted in the lease so that the selling
10 veterinarian could resume his old practice if the buyer
11 defaulted in the purchase of the practice, and thus protected
12 "the very essence of the bargain." 232 B.R. at 67. "Had the
13 cross-default provision been absent from the Lease, [the
14 seller's] one essential condition to the sale -- that he be
15 entitled to step in quickly and operate the business in the
16 event of any default -- would have been thwarted." *Id.*

17 The agreements in *Liljeberg* and *Kopel* containing the cross-
18 default clauses were economically interdependent: the
19 consideration for one agreement supported the other. The courts
20 observed that the non-debtor party would not have entered into
21 one agreement without the other. *Liljeberg*, 304 F.3d at 445;
22 *Kopel*, 232 B.R. at 67 ("[Debtor] has not even argued that he
23 could have entered into the Lease without also entering into the
24 Non-Lease Agreements."). They both involved significant extant
25 defaults as of the petition date that needed to be cured.

26 Here, however, Debtors cured the defaults in full when they
27 assumed their agreements with ConEd. Notwithstanding the large
28 dollar amounts at stake here, and the obvious reason for ConEd's

1 development of the generation facilities, there is insufficient
2 similarity with those illustrative cases to disregard the
3 applicability of section 365(b)(2). As noted previously, the
4 only so-called cross-default relied on by ConEd is the very same
5 *ipso facto* clause that runs afoul of that section. No other
6 provision of the third party financing has been identified.

7 ConEd might have insisted on enforceable cross-default
8 provisions in the PPAs, but it did not. It might have insisted
9 on Debtors' adoption or guarantee of the obligation to the Third
10 Party Lenders, but it did not. The court will not re-write
11 those operative agreements. To permit ConEd to enforce
12 bankruptcy default provisions and non-specific cross default
13 provisions would be to disregard sections 365(b)(2), 365(e)(1),
14 541(c) and other provisions of the Bankruptcy Code.

15 D. Regardless of the applicable *ipso facto* provisions,
16 ConEd likely may not recover consequential damages.

17 The parties focused on the narrow *ipso facto* issue as just
18 discussed, but flagged this alternative argument.

19 Even if ConEd had pled a claim for relief that did not
20 violate the various *ipso facto* clauses set forth in the
21 Bankruptcy Code, the express terms of the CED Agreements suggest
22 that the damages it seeks are consequential, incidental or
23 indirect in nature. Section 7.1 of the PPAs bar such
24 consequential damages: "[n]either party shall be liable for
25 consequential, incidental, punitive, exemplary or indirect
26 damages, lost profits or other business interruption damages, by
27 statute, in tort or contract, under any indemnity provision or
28 otherwise." The IAs similarly provide that

1 "In no event shall any Party be liable under any
2 provision of this [IA] for any losses, damages, costs
3 or expenses for any special, indirect, incidental,
4 consequential, or punitive damages, including but not
5 limited to loss of profit or revenue, loss of the use
6 of equipment, cost of capital, cost of temporary
equipment or services, whether based in whole or in
part in contract, in tort, including negligence,
strict liability, or any other theory of liability."

7 Here, ConEd argues that the commencement of Debtors' cases
8 caused it to default on its obligations owed to the Third Party
9 Lenders and seeks damages arising from those defaults. Yet
10 Debtors were not parties to or guarantors of ConEd's agreements
11 with the Third Party Lenders. ConEd's alleged damages did not
12 arise from any term or obligation set forth in the PPAs and IAs;
13 to the contrary, all defaults relating to those documents were
14 cured as of the Effective Date of the Plan. But even if ConEd
15 had further legitimate claims against Debtors, the damages it
16 seeks do appear incidental, indirect or consequential. But for
17 the filing of the bankruptcy petitions, they would not exist.
18 The purported damages are a consequence of the bankruptcy but
19 not of a breach of the CED Agreements.

20 The court leaves this question for further consideration if
21 and when appropriate.

22 IV. CONCLUSION

23 ConEd's Amended Cure Demand arises from Debtors' act of
24 filing the underlying bankruptcy cases; but for the commencement
25 of these chapter 11 cases, these claims would not exist.
26 Consequently, the claims are not cognizable under the Bankruptcy
27 Code. Therefore, for the reasons stated above, the court
28

1 SUSTAINS Debtors' Objection to ConEd's Amended Cure Demand
2 seeking an additional cure payment of \$11,844,598.00

3 The court is concurrently issuing an order consistent with
4 this memorandum decision.

5 * * END OF MEMORANDUM DECISION * *
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